Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JESSE L. NIPPER, et al.,

Petitioners,

v.

JIM SMITH, SECRETARY OF STATE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), this Court held that Section 2 of the Voting Rights Act, 42 U.S.C. §1973, applies to at-large election districts for state trial judges, and that a state's interest in maintaining its challenged system "does not automatically, and in every case, outweigh proof of racial vote dilution", but is "merely one factor" to be weighed. 501 U.S. at 427. In this case, the Eleventh Circuit, sitting en banc, held that the petitioners, black voters, could not prevail in their Section 2 challenge to two at-large election districts in Florida because the state's interest in maintaining existing at-large election districts for trial court judges outweighs, as a matter of law, any proof of racial vote dilution, no matter how strong. The questions presented are:

1. Whether, under Section 2 of the Voting Rights Act, a state's interest in maintaining at-large elections for trial judges precludes any remedy as a matter of law, without regard to the severity of the racial vote dilution shown by the evidence?

2. Whether a state's interest in maintaining existing at-large election districts for trial court judges is relevant at the liability stage of a lawsuit under Section 2, or only at the remedy stage, and, if relevant at the liability stage, what weight should it carry?

3. What are the appropriate standards for evaluating a Section 2 vote dilution challenge to at-large election districts for state trial judges?

Actual parties to the proceedings in the Court of Appeals were:

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Dot Joyce, Director of Florida Division of Elections
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Respondents herein

In addition, the following parties appeared as amici curiae in the Court of Appeals:

The United States of America
NAACP Legal Defense & Educational Fund, Inc.
The Trial Lawyers' Section of the Florida Bar

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners are black citizens and voters in Duval County, Florida, and in Florida's Fourth Judicial Circuit. They seek a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review that Court's en banc decision rejecting their challenge under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, to the use of at-large, majority white election districts with numbered posts and a majority-vote requirement to elect all of the 28 judges of the Fourth Circuit and all of the 12 judges of the Duval County Court.

OPINIONS BELOW

The December 2, 1994 opinion of the en banc Eleventh Circuit is reported as *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), and is reproduced in Appendix A to this petition. The September 15, 1993 opinion of the Eleventh Circuit panel is reported at 1 F.3d 1171 (11th Cir. 1993), and is reproduced in Appendix B. The June 2, 1992 opinion of the United States District Court for the Middle District of Florida is reported at 795 F. Supp. 1525 (M.D. Fla. 1992), and is reproduced in Appendix C.

STATEMENT OF JURISDICTION

The en banc opinion of the Eleventh Circuit was issued on December 2, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the application of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which is reproduced in Appendix D.

STATEMENT OF THE CASE

Duval County's population is 24.4% black and the population of the Fourth Judicial Circuit, composed of Duval, Clay, and Nassau Counties, is 21% black. The 28 judges on the Fourth Judicial Circuit Court are elected circuitwide and the twelve judges on the Duval County Court are elected countywide in these majority white election districts. The evidence at trial showed that no black candidate had ever been elected to the Fourth Circuit or the Duval County Court in a contested election, even though several had run. App. at 9a, 15c-16c. As the District Court found, each of those election contests was characterized by severe racially polarized voting, with the majority of black voters choosing the black candidate and the vast majority of white voters supporting the white candidate, resulting in the consistent defeat of the black candidates. App. at 23a, 90a-92a, 28c-29c. Testimony indicated there would have been additional black candidacies but for the apparent futility of running in the existing majority white election districts in the context of such severe white bloc voting. App. at 92-93a; Trial Transcript ("Tr.") Vol. 1 at 118-20; Vol. 2 at 8-14.

At the time this lawsuit was filed, only one black judge had ever served on the circuit court and only one on the county court, and both reached office by way of mid-term appointments to vacancies. Prior to the trial in this case, a second black judge was appointed to the county court, but at the time of trial still only one black judge served among the 28 on the circuit court. App. at 8a-9a, 21c.

Since 1942, circuit judges in Florida have been selected by popular election, and county court judges have generally been popularly elected during that time period

as well.[1] In 1972, partisan political primaries were eliminated for judicial elections, but contested popular elections were retained. In 1976, Florida amended its constitution to provide for appointment of Florida appellate and Supreme Court judges, with periodic retention elections. Elections for trial court judges were retained in 1976, however, and have survived a number of efforts by the Florida Bar to convince the legislature to abolish such elections and institute an appointment system. *See generally* Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla. L. Rev. 529, 539-40 & n. 101 (1991) ("Judicial Selection Methods in Florida").

Florida law currently permits judges elected in one district to sit by assignment in another district; for example, county judges may sit as circuit judges within their circuits, even though many of the circuits are composed of several counties and the county judges are elected only by voters within the county. Fla. Stat. § 26.57. Judges are also permitted to preside over cases in which the attorney for one litigant, but not the other, has made campaign contributions to the judge. *MacKenzie v. Super Kids Bargain Store*, 565 So. 2d 1332 (Fla. 1990). Lawyers are estimated to make approximately 80% of the contributions to judicial campaigns in Florida. *Judicial*

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[1] From 1913 until 1942, circuit judges in Florida were appointed by the Governor after nomination in party primary elections, but in 1942 gubernatorial appointment was replaced by direct popular elections of circuit judges. Def. Ex. 3 at 59-60. During approximately the same period, the selection of lower level trial court judges, including county judges, went back and forth between appointment and direct popular election, but since 1966 county judges have been subject to popular election. *Id.* at 70-72.

Selection Methods in Florida, at 556.

As the District Court found, Florida has a long history of racial discrimination in elections and in other walks of life, including legal education, and black citizens continue to suffer from this history, particularly in terms of pronounced socioeconomic disparities. App. at 26a-27a, 18-20c.

The at-large judicial elections for the Fourth Circuit and the Duval County Court are characterized by a majority vote requirement, a numbered-place system, and the use of staggered terms. The election districts are very large -- the Fourth Circuit covers approximately 2,017 square miles and contains a 1990 census population of 822,898. Duval County covers approximately 776 square miles and contains a 1990 census population of 672,971. App. at 12c. In order to qualify to run for a judgeship, a candidate must pay a filing fee of approximately $4,400 for county court and $5,000 for circuit court, although a candidate can avoid the fee by a petition process with a number of signatures from registered voters. App. at 12c-13c.

The evidence at trial included the two recent reports of the Florida Supreme Court Racial and Ethnic Bias Study Commission, which concluded that the underrepresentation of minorities on the bench in Florida is a serious problem that undermines the proper administration of justice in the state court system. As stated in the initial report, "the current election process, which provides for circuit-wide, at-large elections, is not yielding sufficient representation of minorities on Florida's bench." Pl. Ex. 7 at 16-17; App. at 27a. The subsequent report noted that the underrepresentation of minorities in the Florida judiciary "perpetuate[s] a system which is . . . unfair and insensitive to individuals of color. . . . [and]

weakens the very system of ordered liberty upon which our democracy is based." Pl. Ex. 15 at vii-viii; App. at 28a. Among the remedies the Commission recommended for consideration was the use of judicial election subdistricts. Pl. Ex. 7 at xii, App. at 28a.

In order to demonstrate that black voters would be able to elect candidates of choice in the absence of the challenged electoral configuration, *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 and n. 17 (1986), the plaintiffs presented evidence -- and the District Court found -- that a geographically compact election district easily could be drawn in the northwest quadrant of Duval County with a 60% black voting age majority. It would be of sufficient size to elect six of the 28 circuit court judges and three of the twelve county court judges. The district would contain a population of 173,967, which is larger than that of the existing Third Judicial Circuit in Florida (located in North Florida near the Fourth) or the existing Sixteenth Judicial Circuit, and larger than most of Florida's county courts. App. at 103a-104a, 108a, 13c, 27c-28c; Pl. Ex. 4A, 5, 8-9. Use of such a district would permit some judges to be elected from a majority black election district and some from a majority white district, rather than the current configuration in which all are elected from a majority white district.

Of course, subdistrict elections are not the only remedial option. Indeed, whenever a voting rights violation is found, the state has the first option of adopting a remedy, and it has great flexibility in doing so, as long as the remedy cures the violation. *See McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981). In their complaint, the plaintiffs did not confine themselves to seeking only one particular remedy such as subdistricts, but instead broadly requested relief that would redress the dilution caused by the existing districts. Complaint,

¶27(c). The District Court, concluding that plaintiff's evidence regarding a potential majority black district adequately addressed what is known as the first factor of the *Thornburg v. Gingles* threshold test, precluded plaintiffs from presenting evidence regarding other potential remedies, instead holding that such evidence should await the remedy phase of the case if a violation were found. App. at 46c; *see* Tr. Vol. 5 at 81.[2]

Despite the evidence demonstrating the inability of black voters to elect candidates of choice in the election districts under challenge, the District Court denied the Section 2 claim. Although the court concluded that that voting patterns in the election contests between black and white candidates "would ordinarily make out a sufficient showing of racial polarization," App. at 29c, it found

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[2] The state could consider a number of remedial options. Subdistricts, which generally involve the division of an at-large election district into subdistricts for election purposes, with judges continuing to hear cases arising throughout the original district, are only one option. If a majority black election district were created along with one or more majority white districts, the State could make its own decisions regarding jurisdiction and case assignment. Judges elected from the newer and smaller districts could continue to hear cases arising from the original district, or they could hear only cases arising from their election districts. (Florida law currently allows county court judges elected from only one county within the various multi-county circuits to sit by assignment as circuit judges hearing cases arising from throughout the circuit. Fla. Stat. § 26.57). If the state wanted judges to be electorally accountable to the voters of the original district, it could hold competitive elections from subdistricts followed by retention elections in the original district, either in conjunction with the initial election or at the mid-term point. Other options include modified at-large systems such as limited or cumulative voting, or the elimination of the majority vote requirement or other dilutive features, if that is sufficient to cure the violation.

against the plaintiffs on the issue of racial polarization for a variety of reasons. *Id.* at 39c-35c.[3] The District Court also ruled that even if polarized voting had been established, the defendants should nevertheless prevail because, in the District Court's words, "the voting community is not driven by racial bias." App. at 36c.

On appeal, a panel of the Eleventh Circuit reversed and ordered that judgment be entered for the plaintiffs. 1 F.3d 1171 (11th Cir. 1993). The panel held that the District Court's reasons for rejecting the clear evidence of polarization conflicted with this Court's decision in *Gingles*. App. at 14b-21b. The panel also held that it need not decide whether plaintiffs were required to prove racial bias in "the voting community," because even if that were a requirement under Section 2, the plaintiffs had met it. As the panel noted, the evidence demonstrated the presence of bias among the voting community because black candidates for judgeships in the jurisdiction always lost to white candidates as the result of polarized voting, regardless of candidate qualifications or any other factor. *Id.* at 21b-26b.

The Eleventh Circuit granted rehearing en banc, and upon review, by a 6-2 vote, rejected the panel decision and affirmed the District Court's ruling against the plaintiffs, although on completely different grounds than those employed by the District Court. Chief Judge Tjoflat wrote an opinion that was joined in its entirety by Judge Anderson and in parts III(A) and III(B)(1) by four other judges. Judge Edmondson, writing for four of the six judges in the majority, wrote a short opinion explaining

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[3] These reasons were later rejected by all of the Eleventh Circuit judges who addressed the issue. 39 F.3d at 1537-41 (opinion of Tjoflat, C.J., joined by Anderson, J.); App. at 14b-21b (panel opinion joined by Hatchett and Kravitch, JJ).

his own reasons for rejecting the plaintiff's Section 2 claim, as well as his joinder in parts III(A) and III(B)(1) of Chief Judge Tjoflat's opinion.[4] He also stated that he concurred in the conclusion contained in Part V of Chief Judge Tjoflat's opinion, adding that while he did not necessarily disagree with the remainder of Chief Judge Tjoflat's opinion, he saw no reason to reach the issues encompassed by it. He was joined by Judges Birch, Cox, and Dubina. Judge Hatchett wrote a dissenting opinion, joined by Judge Kravitch.

The six judges in the majority held that the State's alleged interest in retaining the at-large election structure (with numbered posts and a majority-vote requirement) outweighs, as a matter of law, the vote dilution that stems from black voters being submerged in these majority white districts and precludes any relief under Section 2. Chief Judge Tjoflat's opinion for himself and Judge Anderson analyzed the evidence of racial polarization and vote dilution coming from these election districts. Although he adopted an extraordinarily high burden for plaintiffs in Section 2 cases -- requiring that plaintiffs demonstrate "that a voting community is driven by racial bias," App. at 63a -- part IV of his opinion concluded that the evidence in this case meets that standard and racial bias consistently prevents black voters from electing candidates of choice in the challenged districts. App. at 99-102a. However, Chief Judge Tjoflat held in part V of his opinion that plaintiffs could not prevail because of the weight of

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[4] Three of the Eleventh Circuit judges -- Judges Black, Carnes, and Barkett -- recused themselves and did not participate. One of the judges on the orginal panel was Judge Clyde Atkins of the Southern District of Florida, who was sitting by designation, and, accordingly, he did not participate in the en banc rehearing.

the state's interest in maintaining the existing at-large election districts. Using reasoning that would not be limited to Florida, but would apply to any state electing trial judges in at-large elections, Chief Judge Tjoflat concluded in Part V that any remedy "would have the effect of undermining the [state] court's ability to administer justice." *Id.* at 112a.. This followed the earlier pronouncement in Parts III(A) and III(B)(1) of his opinion, which were joined by all six judges in the majority, in which Chief Judge Tjoflat said plaintiffs cannot prevail unless there is "a remedy within the confines of the state's judicial model that does not undermine the administration of justice." App. at 77a.[5]

In his opinion for four of the six judges in the majority, Judge Edmondson described their reasons for rejecting the Section 2 claim:

> The State of Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, *as a matter of law*, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here.

App. at 113a. (emphasis added). Indeed, Judge Edmondson and the other three judges who joined his opinion specifically declined to evaluate or weigh the

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[5] Chief Judge Tjoflat's opinion includes a lengthy section which offers a description of Florida's current election system (Part I of opinion, App. at 7a-20a). However, as the opinion acknowledges, that discussion is premised in part on sources of information not presented to or considered by the district court, App. at 6a and the four concurring judges did not join in this portion of Chief Judge Tjoflat's opinion.

evidence of vote dilution and racial polarization, and declined to join the portions of Chief Judge Tjoflat's opinion analyzing the evidence of vote dilution in these districts. Instead, Judge Edmondson said:

> I do not say that the rest of the Chief Judge's opinion is wrong. But, I believe the conclusions reached in the other parts are *unessential to deciding this case*; and to decide nothing about what seem to be unnecessary issues seems best.

Id. (emphasis added). Judge Edmondson also suggested that the state's right to formulate its own judicial system would preclude any potential voting rights remedy:

> I understand Part V of the Chief Judge's opinion to conclude that each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system. I concur in this conclusion, which I see as the holding of this case. But I cannot agree (and I doubt the Chief Judge means to say) that a remedy must undermine the administration of justice in the state courts before that remedy would fall beyond the power of the federal courts to impose under the Voting Rights Act.

Id.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S HOLDING IN *HOUSTON LAWYERS' ASSOCIATION V. ATTORNEY GEN. OF TEXAS*, 501 U.S. 419 (1991).

In *Houston Lawyers' Association v. Attorney Gen. of Texas*, 501 U.S. 419 (1991) ("*Houston Lawyers*"), this Court squarely held that the "results" test of Section 2 of the Voting Rights Act applies to claims challenging judicial elections, and that a state's interest in maintaining a particular judicial election scheme does not exempt the scheme from scrutiny to determine if it unlawfully dilutes minority voting strength. 501 U.S. at 428. Under the holding in *Houston Lawyers*, when states choose to employ popular elections for their trial court judges, those elections are subject to the anti-dilution strictures of Section 2. As this Court stated: "[b]ecause the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the 'totality of circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution." 501 U.S. at 427.

In the Eleventh Circuit, however, a different rule now prevails. In the Eleventh Circuit, regardless of the severity of racial discrimination in at-large judicial elections, that discrimination is beyond the reach of Section 2 of the Voting Rights Act, because the state's prerogative of structuring its judicial election system as it sees fit precludes any remedy as a matter of law.

Chief Judge Tjoflat, joined by Judge Anderson, expressly found that plaintiffs had proved dilution of their voting strength and had demonstrated that the voting community in the North Florida jurisdiction at issue is

actually "driven by racial bias" in its voting patterns. App. at 63a, 99-102a. Chief Judge Tjoflat's opinion nevertheless holds that no relief is available under the Voting Rights Act, regardless of the dilution of black voting strength, because any alteration of this discriminatory system would "undermin[e] the [state] court's ability to administer justice". App. at 112a. Four other judges stated that they saw no need to reach issues such as the extent of racially polarized voting or whether plaintiffs proved vote dilution, because "Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, *as a matter of law*, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here." App. at 113a (Edmondson, J., joined by Cox, Birch, and Dubina, JJ., concurring in part and concurring in the result) (emphasis added). Judge Edmondson's opinion concluded that "each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system." *Id.*[6]

In short, for the Eleventh Circuit, state interests establish an absolute bar which restrict the reach of the Voting Rights Act and preclude any remedy, regardless of any other fact. Indeed, although Chief Judge Tjoflat's opinion extensively discussed the plaintiffs' evidence of

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[6] Indeed, these four judges apparently advocated a view requiring even more deference to state interests than that advocated by Chief Judge Tjoflat and Judge Anderson. The concurring opinion states: "I cannot agree (and I doubt the Chief Judge means to say) that a remedy must undermine the administration of justice in the state courts before that remedy would fall beyond the power of the federal courts to impose under the Voting Rights Act", *id.* (Edmondson, J., concurring in part and concurring in the result).

vote dilution, that evidence *played absolutely no role* when Chief Judge Tjoflat addressed (in Part V of his opinion) the issue which he deemed dispositive: the effect of a possible remedy on the state's interests. In any event, four members of the six-member majority explicitly held that evaluation of other issues such as vote dilution is "unessential to deciding this case." *Id.*

Such a rule cannot possibly be squared with *Houston Lawyers'* holding that state interests are merely "one factor" to be considered under the totality of circumstances, rather than a basis for exempting judicial elections from the coverage of the Voting Rights Act. 501 U.S. at 428. It conflicts with that holding for the Eleventh Circuit to embrace a rule forbidding all remedies in a judicial election case as a matter of law, without regard to the severity of the racial discrimination caused by the current system.[7] In determining whether a remedy for vote dilution was permissible under the Voting Rights Act, the Eleventh Circuit gave no weight to the strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination in the election

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[7] The impact of the Eleventh Circuit's rule is stark. In 1992, a district court ruled that at-large judicial elections in the Second Judicial Circuit and the Leon County Court (also in North Florida) unlawfully diluted black voting strength under Section 2. *Davis v. Chiles*, No. 90-40098-MP (N.D. Fla. Sept. 3, 1992). Indeed, in that case, the district court found that no black judge had *ever* sat on the circuit or county court, and no black candidate had won a contested countywide or circuitwide election for *any* office, let alone judicial office, since 1976, even though the circuit is nearly 30% black in population. No remedial proceedings have ever been held in *Davis*, however, because of the pendency of appellate proceedings in *Nipper*, and it appears that no relief for the Section 2 violation can ever be awarded if the *Nipper* ruling stands. *Davis* remains on hold pending the disposition of this petition for certiorari.

process. Consistent with the Supremacy Clause, Congress has the power to pass legislation that remedies racial discrimination, even when state interests are affected. Using its broad powers under the Fourteenth and Fifteenth Amendments, Congress enacted the Voting Rights Act in 1965 to "rid the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 365 (1966), and strengthened the Act in 1982 to outlaw election practices that result in racial discrimination, even if the result is unintentional. One of Congress' primary concerns in 1982 was the potential for racial vote dilution through the use of at-large, multimember election districts in which a politically cohesive, geographically compact minority population may find its voting strength submerged, year after year, by white bloc voting.[8]

Thus, it would be contrary to Congress' intent to permit the continuation of a racially discriminatory election system simply because the state can assert an interest in the challenged scheme. As the Senate Report accompanying the 1982 amendment of Section 2 stated concerning state interests:

> [e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. Rep. No. 97-417, 97th Cong., 2d Sess. at 29 n.117,

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[8] *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993) ("multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts"); *Thornburg v. Gingles*, 478 U.S. at 47, 48.

reprinted in U.S.Code, Cong. & Admin. News 177, 207.[9]

Chief Judge Tjoflat and Judge Edmondson relied heavily upon the state's purported interest in "linking" the electoral base and the area of case assignment, believing that this should preclude as a matter of law any remedy in which judges would be elected from a subdistrict of the circuit or county.[10] Of course, when state election schemes are found to violate federal law, this Court's precedents hold that the state has the first option of formulating a remedy, and it has great flexibility in doing so, as long as the violation is cured. *McDaniel v. Sanchez*, 452 U.S. at

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[9] At the congressional hearings on the amendment of Section 2 which was adopted in 1982, numerous witnesses testified about discrimination in judicial elections (among other elections), presented examples of how vote dilution hampered the election of minority judges as well as other officials, articulated the need for better minority representation on the bench, and cited polarized voting patterns in elections for judges as well as for other offices. *See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act*, 97th Cong., 2d Sess. (1982), 306 n.33, 669, 748; *Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) 234 260, 516-28, 550, 571, 574, 825, 930, 940-42, 949, 1010, 1188, 1243, 1745, 2647-48. *See generally* Brief for the Lawyers' Committee for Civil Rights Under Law, *et al.*, as *Amici Curiae* in Support of Petitioners, in *Chisom v. Roemer* and consolidated cases, Nos. 90-757, 90-1032, 90-813, & 90-974, at 14-19 (discussing testimony at congressional hearings).

[10] The opinions referred to linkage between electoral base and "jurisdiction." At present, however, Florida judges have "jurisdiction" -- in terms of judicial authority -- outside their current election districts, because they can be assigned to hear cases arising from other districts.

150 n.30. The plaintiffs here did not limit the request for relief in their complaint, or in the course of this litigation, to any particular remedy such as subdistricts, but instead have broadly requested a remedy that will avoid dilution of their voting strength. Complaint, ¶ 27(c). Thus, the question of whether to preserve any state interest in "linkage" is a question for the state to answer in formulating a proposed remedy. Remedies are fully available by which the state could preserve this linkage, including (but not limited to): creating a new district in which judges will generally hear cases arising from within that district; employing modified at-large systems such as cumulative or limited voting[11]; or holding an initial election from subdistricts, followed by a later retention election in which all of the voters of the jurisdiction would vote to approve or disapprove the winner of the subdistrict election.

Even if the desirability of subdistricts were the controlling issue, the State produced no evidence at trial that "linkage" of electoral base and jurisdiction constitutes a strong -- much less a compelling -- state interest in Florida.[12] Two incumbent white judges testified as to their personal belief that creation of a subdistrict would be

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[11] *See* Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 Yale L. & Policy Rev. 354 (1991) (explaining operation of modified at-large election systems).

[12] As to subdistricts -- the only potential remedy addressed by the district court -- the district court held only that the State had a "legitimate" interest in its current at-large scheme. App. at 46c. The district court did not find that the use of subdistricts would "undermine the administration of justice" in Florida or even that the State had a *compelling* state interest in "linkage."

undesirable because judges might feel pressure to favor litigants from their own subdistrict. Tr. Vol. 3 at 130, 190. But witnesses for both the State and the plaintiffs acknowledged that under Florida's current system judges regularly hear cases in which one litigant but not the other resides in the judge's jurisdiction, and do so fairly and impartially. Tr. Vol. 3 at 198-99; Vol. 5 at 7. Furthermore, Florida law permits judges elected from a subunit of a circuit -- county court judges -- to sit by assignment as circuit judges, even though circuits usually encompass more than one county. Fla. Stat. § 26.57. Thus, Florida has no state interest in "linkage" so overwhelming that it overrides contrary federal policy expressed in the Voting Rights Act. *Cf. Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (more is required than "the mere incantation of a proper state purpose" to uphold state action which infringes important rights).[13]

Indeed, *all* states which use at-large judicial elections could claim this type of generalized interest in maintaining "linkage." If that is sufficient to remove a state's judicial elections from the reach of Section 2, then this Court's decision in *Houston Lawyers* would be meaningless: all states that have discriminatory at-large

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[13] Indeed, Florida currently tolerates practices that are much more likely to call into question a judge's independence than the creation of subdistricts -- namely, campaign contributions to judges by lawyers who then appear before the judge on behalf of a litigant. *See MacKenzie v. Super Kids Bargain Store*, 565 So. 2d at 1334-38; Tr. Vol. 3, at 127, 135. As *MacKenzie* reasoned, "As with other elections, judicial elections involve campaigns. As with other campaigns, judicial campaigns require funds". *Id.* at 1335. A litigant, even when he resides in the judge's election district, has at most one vote to provide, while financial contributions from lawyers are potentially much more important in the election context.

judicial elections would be able to escape Section 2's strictures merely by pointing to their interest in "linkage."

Chief Judge Tjoflat's opinion also relies on speculation that subdistricts *might* impair state interests by discouraging white attorneys from standing for office in majority-black districts, and vice-versa. App. at 107a. This simply ignores his own earlier finding that black attorneys *are currently discouraged from running for any position on the court* because of pervasive white bloc voting. App. at 92a-93a.

In contrast to this speculation, the plaintiffs presented undisputed evidence that subdistrict elections *actually in use* in other states are working well. Judge Robert Gibbs, a judge elected under a subdistrict plan in Mississippi, and attorney Spencer Gilbert, who practices business and commercial litigation in that jurisdiction, both testified that the subdistricting system is not at all harmful to the administration of justice, and indeed has improved the administration of justice because of the enhanced perception of fairness stemming from a racially integrated bench.[14] Both witnesses confirmed that judges

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[14] Mississippi has used subdistrict elections in eight judicial districts since 1988, when the district court found that at-large elections violated Section 2. *Martin v. Mabus*, 700 F. Supp. 327, 349 (S.D. Miss. 1988). Other states also use subdistricts for all or some of their judicial elections. In 1987, North Carolina adopted a system providing for nomination from subdistricts, with statewide general elections, for trial judges. N.C. Stat. Ann. § 7A-41 (West 1992). In Louisiana, the district court adopted subdistricts as a remedy in *Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991), *appeal dismissed sub nom. Clark v. Edwards*, 958 F.2d 614 (5th Cir. 1992). In Illinois, subdistrict elections were adopted for the election of Cook County trial judges in 1991. 705 Ill. Comp. Stat. Ann. § 50/2 (West 1992). Section 2 lawsuits have also resulted in consent

generally are not even aware of the litigants' addresses, and that a judge perceived as biased against litigants outside his subdistrict would find it difficult to obtain campaign support from the bar, since lawyers continue to practice before all the judges and to play a major role in elections. Tr. Vol. 5 at 24-30, 47-51.

Moreover, as the Eleventh Circuit acknowledged, the district court in this case never addressed the efficacy of any possible remedies other than subdistricts, holding that "proposed remedies are relevant only if a violation is proved." App. at 46c; *see* App. at 103a (acknowledging that district court "did not undertake this inquiry"). Indeed, the district court expressly declined to hear plaintiffs' evidence on possible alternatives to subdistricts. Tr. Vol. 5 at 81. Chief Judge Tjoflat's rejection of all such alternative remedies as a matter of law is thus based merely on unsupported speculation as to their possible consequences.

For example, Chief Judge Tjoflat rejected out of hand the state's option of creating new election districts in which the judges would primarily hear cases arising from those districts, as they do now -- even though this would preserve "linkage". His reasons were that this "would require a modification of Florida's venue rules," would "alter the composition of the courts' jury pools," and would create "a system of separate justice" with "black jurisdictions and white jurisdictions" under which "[c]ases brought by blacks against blacks or by whites against whites could be transferred to the black or white courts, respectively." App. at 108-109a. Of course, the question

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decrees establishing subdistrict elections in Tulsa, Oklahoma, *Robinson v. State*, No. 91-C-468-B (N.D. Okla., order of June 10, 1993), and in Arkansas, *Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark., order of Nov. 7, 1991).

of what to do about venue rules and jury selection would be up to the state.[15] As for Chief Judge Tjoflat's statement that this would create a "system of separate justice," the assertion is wrong. The mere fact that some judges might be elected from a majority black district while others are elected from a majority white district does not create "black jurisdictions and white jurisdictions" in which cases would be transferred based upon the race of the litigants, and no one has ever suggested such a result. If the *current* 80% white district is not deemed a "white court" which constitutes a "system of separate justice," there is no basis to say that such a separate system would be created simply because some judges would be elected from a majority black district.

Chief Judge Tjoflat also rejected, as a matter of law, the state's option of using a modified at-large system such as cumulative voting, arguing that this option might increase the frequency of contested judicial elections, which he believed detrimental to "the independence of the judiciary." App. at 109a-110a . But the State itself has decided to retain popular elections for trial court judges; a possible increase in the frequency of elections that are fully authorized by the state's constitution and laws is not the type of injury to state interests that could block enforcement of the Voting Rights Act.[16] His opinion also

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[15] Assuming the state wished to preserve "linkage," it could provide, as it does now, that cases arising in and properly filed in a district would generally be heard by judges elected from that district. The state could determine whether or not jury pools would be chosen exclusively from within the particular district or from a larger area.

[16] Florida, like the state of Louisiana in *Chisom v. Roemer*, (the companion case to *Houston Lawyers*), "has decided to elect its judges and to compel judicial candidates to vie for popular

asserted that this option would allegedly "have a detrimental effect on the collegiality of the court's judges in administrative matters" by potentially requiring incumbent judges to compete for unnumbered seats. App. at 110a. An earlier part of the opinion, however, asserted that trial judges, unlike appellate judges, do *not* act as a "collegial" court. App. at 103a-105a. Finally, Chief Judge Tjoflat said that this option would "encourage racial bloc voting." Of course, Chief Judge Tjoflat already noted that judicial elections in these districts are saturated with racial bloc voting. The entire purpose of a Section 2 remedy is to allow minority voters to elect candidates of choice even in the context of such voting patterns. Absolutely no evidence was offered to demonstrate that the remedy would somehow *increase* racial bloc voting. Moreover, Chief Judge Tjoflat gave no consideration at all to some remedial options that would preserve "linkage", such as competitive subdistrict elections followed by districtwide retention elections.

This is not to say that any one remedy must be deemed the "preferred" remedy. That choice will be up to the State in the first instance if a Section 2 violation is found. All systems of selection of judges -- or any public officials, for that matter -- have their positive and negative qualities. The point here is that the Voting Rights Act applies when an election system precludes black voters from electing candidates of choice. *Houston Lawyers* instructs that states which choose to elect their judges

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support just as other political candidates do", 501 U.S. 380, 400 (1991); *see also Houston Lawyers*, 501 U.S. at 426. As the Florida Supreme Court noted in 1990: "the citizens of Florida have chosen to retain the power to elect county and circuit judges." *MacKenzie v. Super Kids Bargain Store*, 565 So.2d at 1335.

cannot then claim a state-interest exemption from the requirements of Section 2. The Eleventh Circuit's ruling, by concluding that state interests preclude any remedy as a matter of law, without regard to the severity of racial vote dilution caused by the election system, contravenes this Court's ruling in *Houston Lawyers* and renders Section 2 inapplicable to elections for state court trial judges.

II. THE ELEVENTH CIRCUIT'S DECISION ERRONEOUSLY EXTENDS THE "BENCHMARK" THEORY OF *HOLDER V. HALL*, 114 S.CT. 2581 (1994), TO PRECLUDE A SECTION 2 REMEDY IN A CASE CHALLENGING AT-LARGE, MULTIMEMBER DISTRICT ELECTIONS.

The Eleventh Circuit majority erroneously believed that *Holder v. Hall*, 114 S.Ct. 2581 (1994), required a finding that Florida's interests preclude any remedy here. Quoting language from Justice Kennedy's opinion in *Holder v. Hall*, Chief Judge Tjoflat stated that "'where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.'" App. at 81a-82a, quoting *Holder*, 114 S.Ct. at 2586 (opinion of Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J). Chief Judge Tjoflat, in a portion of his opinion joined by the five other members of the majority, expanded that reasoning to reach a much broader conclusion that any remedy must come from within the confines of the state's existing judicial system. App. at 81a (Part III(B)(1) of opinion). Then, in Part V of his opinion, Chief Judge Tjoflat concluded that no such remedy is available, App. at 103a-112a. Judge Edmondson's opinion for four judges also concluded that the state's "right to formulate its own

judicial system" precluded any remedy. *Id.* at App. at 113a.

Such a reading of *Holder v. Hall* is insupportable and would expand the reach of that holding far beyond the narrow limits carefully set forth in that case. In *Holder*, this Court addressed the unique circumstances of a vote dilution claim through which minority voters sought to increase the size of the elected body. Although not agreeing on the precise rationale, three members of the Court in *Holder* held that no vote dilution claim could be maintained because federal courts did not have a workable means of determining how many members a governing body should contain for purposes of measuring vote dilution.

Contrary to the Eleventh Circuit's reasoning, this holding in no way serves to bar a Section 2 vote dilution challenge to a multimember system such as that at issue here, given that plaintiffs do not seek any change in the number of officeholders. As Justice O'Connor noted in *Holder*:

> This case presents the question whether, in a § 2 dilution challenge **to size**, there can ever be an objective alternative benchmark for comparison. And I agree with Justice KENNEDY that there cannot be. **As Justice KENNEDY points out, *ante*, at 2585, the alternative benchmark is often self-evident. In a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts. . . .** Though there may be disagreements about the precise appropriate alternative practice in these cases, there are

> at least some objectively determinable constraints on the dilution inquiry.

114 S.Ct. at 2589-90 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted, emphasis added). Thus, this Court deliberately distinguished multimember district cases such as this from the unique situation present in *Holder v. Hall.* Because the Eleventh Circuit's reading of *Holder* would create enormous confusion in the determination of Section 2 lawsuits, review by this Court is warranted for this reason as well.[17]

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH HOLDINGS OF THE FIFTH AND SIXTH CIRCUITS AND A THREE-JUDGE COURT IN THE NORTHERN DISTRICT OF CALIFORNIA.

The Eleventh Circuit stands alone in holding that the state's interest in retaining existing judicial election districts outweighs, as a matter of law, any and all evidence of racial vote dilution, and also in holding that plaintiffs cannot prevail in at-large challenges of this sort because of the purported unavailability of remedies.

By contrast, the Sixth Circuit has held, in a very

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[17]Chief Judge Tjoflat, joined only by Judge Anderson on this point, also held that courts must find that the voting community is "driven by racial bias" before it can rule in favor of Section 2 plaintiffs. App. at 99a-103a. This ruling, however, was not necessary to the Court's decision, because Chief Judge Tjoflat found that plaintiffs' evidence satisfied this condition in any event. *Id.* at 99a-102a. However, if the Court is inclined to address this issue, petitioners respectfully contend, as they did in the Eleventh Circuit, that a showing of racial bias in the voting community is not required and would place too great a burden on Section 2 plaintiffs.

recent decision, that the state's interest does not automatically outweigh evidence of vote dilution:

> The state's interest is only one factor to be considered in evaluating the totality of circumstances. It does not automatically outweigh proof of racial vote dilution.

Cousin v. McWherter, 1995 WL 57301 (6th Cir. Feb. 14, 1995), at *10. Instead, said the Court, the state's interest, though substantial, must be weighed "against evidence bearing on the factors indicative of vote dilution." *Id.* Because the district court decision in *Cousin* had not adequately weighed the state's interest, the Sixth Circuit remanded the case for further findings. In doing so, the Sixth Circuit made it clear that, if the evidence of dilution was sufficiently strong to outweigh the state's interest in retaining the existing district, maintenance of the district would violate Section 2 and relief would be required. *Id.*

Also in contrast to the Eleventh Circuit, the Fifth Circuit, sitting en banc, held that while the state's interest must be considered, "we recognize that it will not always defeat § 2 liability." *LULAC v. Clements*, 999 F.2d 831, 876 (5th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 878 (1994). As the Fifth Circuit noted:

> The State of Texas maintains that the linkage interest must defeat liability in *every* case, regardless of the other circumstances in the totality. The Supreme Court rejected this position when it held that the linkage interest does not "automatically, and in every case, outweigh proof of racial vote dilution." *Houston Lawyers'*, __ U.S. __, 111 S.Ct. at 2381.

999 F.2d at 870 (emphasis in original). Instead, said the

Fifth Circuit, the state's interest "is balanced against localized evidence of racial vote dilution" and "must be weighed in the totality of circumstances." *Id.* at 868. If there is "substantial proof of racial dilution," it outweighs any state interest, according to the Fifth Circuit, and is sufficient to demonstrate a violation of Section 2. *Id.* Although the Fifth Circuit ultimately held that the plaintiffs in that case had not carried their burden under Section 2, it was because the Court concluded the evidence of dilution was non-existent or weak at best, and not because the state's interest automatically controlled as a matter of law.

In another decision that is contrary to the analysis of the Eleventh Circuit, a three-judge federal district court held that a state's interest in retaining at-large election districts is not compelling, and that a remedial subdistricting election system would not undermine the state courts' "ability to administer justice." *Lopez v. Monterey County, California*, 1994 WL 713720 (N.D. Cal. Dec. 20, 1994) (three-judge court), at *5-*7 (granting preliminary injunction requesting judicial subdistricts as interim remedy in Section 5 enforcement action). Indeed, in doing so, the three-judge court specifically considered the contrary holding of the Eleventh Circuit in the present case, but declined to follow its rationale. *Id.* at *6-*7.[18]

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[18] The Eleventh Circuit's holding also conflicts with two federal district court decisions from within the Fifth Circuit finding violations of Section 2 despite the states' invocations of state interests in retaining the existing majority white election districts. *Clark v. Roemer*, 725 F.Supp. 285 (M.D. La. 1988), 777 F.Supp. 471 (M.D. La. 1991); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987), and *Martin v. Mabus*, 700 F.Supp. 327 (S.D. Miss. 1988). In both cases, the federal district court found liability, and when the state legislatures failed to adopt remedies, the courts implemented remedial subdistrict plans.

IV. THIS CASE RAISES UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO AT-LARGE ELECTION DISTRICTS FOR STATE TRIAL JUDGES AND THE ROLE OF STATE INTERESTS IN THAT EVALUATION.

In its 1991 decisions holding that Section 2 applies to elections for state court judges, this Court expressly reserved the question of "the elements that must be proved to establish a violation of the Act" in the context of judicial election districts. *Chisom v. Roemer*, 501 U.S. at 390. As the Court stated:

> The standard that should be applied in litigation under § 2 is not at issue here. Even if serious problems lie ahead in applying the "totality of circumstances" described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

501 U.S. at 403 (footnote omitted).

The Court in *Houston Lawyers* also left unresolved the question of whether the state's interest in maintaining existing at-large election districts for trial court judges is relevant at the liability stage or only at the remedy stage:

> [W]e believe [the state's interests] are matters that are relevant *either* to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2, as amended, *or*

> *to a consideration of possible remedies* in the event a violation is proved, but not to the threshold question of the Act's coverage. *Even if we assume, arguendo,* that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts, or may even preclude a finding that vote dilution has occurred under the "totality of the circumstances" in a particular case, that interest does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test.

Houston Lawyers, 501 U.S. at 426 (emphasis added).

Resolution of these issues will have far reaching implications for voters throughout the country. Additional cases challenging the election of state court judges under Section 2 are pending in Alabama, California, Georgia, Indiana, New York, Tennessee, and Wisconsin[19]; and two

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[19] *See Southern Christian Leadership Conference v. Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992), *appeal pending*, No. 92-6257 (11th Cir. filed Mar. 27, 1992) (challenge to at-large circuit court elections in several Alabama jurisdictions, and to drawing of circuit boundaries in one jurisdiction); *Trujillo v. State of California*, No. C-92-20465 RMW (EAI) (challenge to at-large superior court elections in Monterey County); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994) (challenge to at-large elections for superior court judges in various Georgia jurisdictions); *Del Torro v. Cuomo*, No. 92-7739 (S.D.N.Y.) and *Frances v. Cuomo*, No. 92-1144 (S.D.N.Y.) (challenge to judicial elections in New York); *Bradley v. Indiana St. Election Bd.*, 797 F. Supp. 694 (S.D. Ind. 1992) (challenge to at-large retention elections in Lake County); *Cousin v. McWherter* (challenge to at-large circuit and county court elections in Hamilton County);

additional cases are pending in Florida, including a case in which the plaintiffs won a judgment of liability in 1992.[20] Moreover, the Justice Department has frequently objected to at-large judicial elections under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[21] Because Section 2 and Section 5 are generally to be interpreted in tandem, *Chisom v. Roemer*, 501 U.S. at 401, 402, the Department's enforcement of the Act will also be affected by a resolution of the issues presented here.

Thus, the questions left open in *Houston Lawyers* and *Chisom* are likely to recur frequently and are of considerable importance to the proper enforcement of the Act. Review of the Eleventh Circuit's decision will give this Court the opportunity to clarify the proper means of applying the Section 2 totality-of-circumstances test to at-

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Milwaukee Branch of NAACP v. Thompson, No. 94-C1245 (E.D. Wisc.) (challenge to at-large circuit and appellate court elections in Milwaukee County).

[20] *Davis v. Chiles*, No. 90-40098-MP (N.D. Fla. Sept. 3, 1992) (*see* n. 7, *supra*, for discussion of *Davis*). The other Florida case is *De Yurre v. Chiles*, No. 94-1527 CIV KEHOE (S.D. Fla) (challenge to at-large judicial elections in Dade County).

[21] A number of Section 5 declaratory judgment actions seeking judicial preclearance of various at-large judgeships are pending: *Arizona v. Reno*, No. 94-2054 (D.D.C.) (seeking preclearance of at-large superior court judgeships in Navajo and Coconino counties); *Georgia v. Reno*, No. 90-2065 (D.D.C.), slip op. February 3, 1995 (granting preclearance of 62 at-large superior court judgeships in Georgia); *State of New York v. United States*, No. 94-2219 (D.D.C. Dec. 22, 1994) (granting preclearance of 15 at-large judgeships in New York City), motion to reconsider filed Jan. 9, 1995; *Texas v. United States*, No. 1:94-CV01529 (D.D.C.) (seeking preclearance of at-large judgeships in Harris, Tarrant, Fort Bend and Midland counties).

large trial court election districts, to resolve the question of whether state interests are relevant at the liability stage or only the remedy stage, and to determine the appropriate role of state interests if they are relevant at the liability stage.

Indeed, it is of particular importance that Section 2 cases are pending in all of the states of the Eleventh Circuit -- Alabama, Georgia, and Florida. If not reviewed by this Court, the errors in the Eleventh Circuit's en banc analysis will continue to be replicated in those cases and will, at the very least, render Section 2 a dead letter in that circuit in terms of challenges to at-large election districts for state trial judges.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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